90-367

No.

AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA AND KANSAS POWER & LIGHT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BEST AVAILABLE COPY

QUESTION PRESENTED

In this case, the Federal Energy Regulatory Commission authorized a natural gas pipeline to bill its customers for costs attributable to past purchases of gas when the account in which those costs were carried was terminated. The Commission concluded that the pipeline's customers had sufficient notice that they would be responsible for such costs and that there were in any event sufficient grounds for waiving the notice requirements in Section 4(d) of the Natural Gas Act of 1938, 15 U.S.C. 717c(d), to permit the direct billing.

The question presented is:

Whether notwithstanding the Commission's waiver, the Commission's approval of the pipeline's direct billing of its customers for costs attributable to past sales constitutes impermissible retroactive ratemaking.

PARTIES TO THE PROCEEDING

In addition to petitioner Transwestern Pipeline Company, the parties in the court of appeals were:

Citizens Energy Corporation
El Paso Natural Gas Company
Federal Energy Gas Company
Kansas Power and Light Company
Natural Gas Clearinghouse Inc.
Pacific Gas and Electric Company
Process Gas Consumers Group
PSI, Inc.
Public Utilities Commission of the State of California
Southern California Gas Company
Southwest Gas Corporation
Texas Eastern Transmission Corporation
Williams Natural Gas Company

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The Acting Solicitor General, on behalf of the Federal Energy Regulatory Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 897 F.2d 570. The relevant orders of the Federal Energy Regulatory Commission (Pet. App. 55a-98a, 99a-127a) are reported at 43 F.E.R.C. ¶ 61,240 and 44 F.E.R.C. ¶ 61,164.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1990, and a petition for rehearing was denied

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Transwestern Pipeline Co.* v. *Kansas Power & Light Co.*, petition for cert. pending, No. 90-344 (filed Aug. 24, 1990), which seeks review of the same judgment of the court of appeals.

on May 31, 1990 (Pet. App. 26a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 4 and 5 of the Natural Gas Act of 1938, 15 U.S.C. 717c and 717d, are reproduced in relevant part at App., *infra*, 1a-3a.

STATEMENT

This case involves the validity of orders of the Federal Energy Regulatory Commission permitting a natural gas pipeline to bill its downstream customers for the balance remaining in an account attributable to past purchases of gas when the pipeline terminated the account. The Commission approved the arrangement on the ground that the customers had adequate notice that they would be responsible for paying the costs involved and that there were in any event sufficient grounds for waiving the notice requirements in Section 4(d) of the Natural Gas Act of 1938 (NGA), 15 U.S.C. 717c(d), to permit the direct billing of past costs. The court of appeals nevertheless held that the direct billing constitutes impermissible retroactive ratemaking, in violation of the "filed rate doctrine." This case therefore presents issues similar to those presented in (1) *FERC* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2016 (filed June 22, 1990), in which we seek plenary review of another District of Columbia Circuit decision holding that a Commission order impermissibly permitted a retroactive rate increase, and (2) *FERC* v. *Columbia Gas Transmission Corp.*, petition for cert. pending, No. 90-131 (filed July 18, 1990), in which the D.C. Circuit held that notice beyond that waivable under Section 4(d) is required before the Commission may approve direct billing of past costs. We suggest in *FERC* v. *Columbia Gas Transmission Corp.* that the petition in that case be held and disposed of as appropriate in light of *FERC* v. *Associated Gas Distributors*. For reasons we shall explain, we urge similar treatment here.

1. This case arises from the Commission's efforts to prevent future problems resulting from take-or-pay clauses in gas purchase contracts that many pipelines entered into with producers between 1977 and 1982.[2] A take-or-pay clause obligates a pipeline to pay for a certain amount of gas at the contract price even if the pipeline does not actually take the gas. Typically, a pipeline may make up a deficiency by purchasing additional gas over a succeeding period, such as five years. By 1982, the supply of natural gas began to exceed demand, primarily because of the price incentives and phased deregulation schedule for "new" gas under the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.* Demand then began to fall because of warm winters, a recession, and customers' switching to alternative fuels. As a result, pipelines began to accrue substantial exposure under their take-or-pay contracts with producers. 89-2016 Pet. 4-5.

Beginning at about the same time, the Commission took a number of steps to effectuate the more competitive wellhead market instituted by the NGPA. First, the Commission eliminated the minimum bill provisions in many pipelines' tariffs, which obligated the pipelines' sales customers to pay for a certain amount of gas even if they did not actually take the gas. Second, the Commission sought to encourage pipelines to transport gas other than their own supplies. In Order No. 436,[3] the Commission required pipelines seeking blanket authorization for transportation service to become open-access pipelines, which are prohibited from refusing to transport gas in competition with their own sales and required to allow their sales customers to convert contract rights to pur-

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[2] The background of the take-or-pay problem and the Commission's efforts to address it are described in greater detail in our certiorari petition (at 4-13) in *FERC* v. *Associated Gas Distributors* [hereinafter 89-2016 Pet.].

[3] Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* [1982-1985] FERC Stats. & Regs., Regulations Preambles ¶ 30,665 (1985).

chase gas into rights to have the pipeline transport gas they purchased from others. The D.C. Circuit sustained most features of Order No. 436 in *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (1987) (*AGD I*), cert. denied, 485 U.S. 1006 (1988), but remanded for further proceedings, because, *inter alia*, the Commission had failed either to address pipelines' take-or-pay problems in connection with its new open-access policy or to explain adequately its reasons for not doing so. The court was concerned that Order No. 436 would enable more pipeline customers to purchase gas directly from producers, thereby increasing the pipelines' take-or-pay liability and denying them bargaining leverage in settling that liability. 824 F.2d at 1020-1030; see 89-2016 Pet. 6-8.

On remand from *AGD I*, the Commission adopted Order No. 500,[4] an interim rule and policy statement that, *inter alia*, set forth guidelines under which a pipeline could bill a new charge (called a gas inventory charge) to recover on a *current* basis the cost of maintaining an inventory of gas to meet customers' contract rights to sales service. By replacing after-the-fact recovery of accrued take-or-pay liability with recovery on an ongoing basis, the gas inventory charge was expected to reduce the likelihood of a mismatch between a pipeline's gas supplies and its customers' actual purchases and to prevent accumulation of take-or-pay liability in the future. The final rule, Order No. 500-H, retained the policy statement concerning the gas inventory charge, which was to be implemented on a case-by-case basis.[5] See Pet. App. 6a-7a; 18 C.F.R. 2.105.

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[4] Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regulations Preambles ¶ 30,761 (1987).

[5] Order No. 500-H, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regulations Preambles ¶ 30,867, at 31,577 (Dec. 13, 1989), reh'g granted in part, Order No. 500-I, FERC Stats. & Regs., Regulations Preambles

2. a. On December 1, 1987, Transwestern Pipeline Company filed tariff sheets proposing (1) to allow its two major sales customers, Southern California Gas Company (SoCal) and Williams Natural Gas Company, to designate the amounts of gas they expected to purchase, and (2) to establish, for the effective period of any such designation, both a charge for Transwestern's cost of obtaining the gas that SoCal and Williams purchased and a gas inventory charge for portions of the designated amount that they did not purchase. Pet. App. 8a-9a. Because both charges were to remain unchanged during the effective period of the designations, Transwestern proposed to terminate the purchased gas adjustment (PGA) provision in its existing rate schedule. Under the PGA approach, a pipeline bills its sales customers a commodity charge [6] for a given period based on its projection, made prior to the start of the period, of the costs it will incur in purchasing the gas. Any difference between the projected and actual costs is accumulated in the pipeline's "Account No. 191" and is then collected from or refunded to the customers through a surcharge on gas purchased in the succeeding period. Pet. App. 14a. Because Transwestern's filing eliminated the system of projecting rates based on past experience, "the entire theory underlying the PGA and Account 191 became irrelevant" and Transwestern therefore proposed to terminate that account. *Ibid.* However, Transwestern sought authority under which, if both SoCal and Williams designated zero future purchases, it could bill them directly for the proportional amount of the unrecovered balance in Transwestern's Account No. 191, based on their contract demand in the prior period. *Ibid.*

¶ 30,880 (Feb. 12, 1990), aff'd in relevant part and remanded, *American Gas Ass'n* v. *FERC*, No. 87-1588 (D.C. Cir. Aug. 24, 1990).

[6] A commodity charge is a charge paid for each unit of gas actually taken, in contrast to a fixed charge, which is paid regardless of how much gas is taken.

By orders dated May 11 and July 29, 1988, the Commission approved Transwestern's proposal. Pet. App. 55a-98a, 99a-127a. In particular, the Commission permitted Transwestern to recover any uncollected balance in Account No. 191 by direct billing of SoCal and Williams, while requiring Transwestern to make direct refunds to SoCal and Williams if Account No. 191 reflected overcollections at the time it was terminated. *Id.* at 73a-74a & n.39, 86a, 112a-113a. The Commission rejected the contention that the direct billing violates the filed rate doctrine and constitutes prohibited retroactive ratemaking. It reasoned that Transwestern's customers had notice, through operation of the surcharge component of the PGA mechanism, that they would ultimately pay all actual gas costs—including those reflected in Account No. 191—and that, with the termination of the PGA, direct billing is "an appropriate surrogate" for the surcharge mechanism. *Id.* at 112a-113a. The Commission further found that, if the direct billing constituted retroactive ratemaking, there were sufficient grounds for waiving the notice requirements of Section 4(d) of the NGA to permit the arrangement. *Id.* at 113a. Section 4(d) provides that "[u]nless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate * * * except after thirty days' notice to the Commission and to the public," but that "[t]he Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice * * *."

b. A number of parties sought review of the Commission's orders in the D.C. Circuit. As relevant here, the court held that Transwestern could not bill SoCal and Williams for any of the balance in its Account No. 191 attributable to costs incurred prior to May 11, 1988, the date of the Commission's order approving Transwestern's filing. Pet. App. 14a-21a.[7] According to the court, the filed

[7] Because SoCal and Williams designated no purchases from Transwestern, the court found that most issues concerning the

rate doctrine "prohibits the Commission from imposing a rate different from the one on file at the time gas is sold * * * [and] allows purchasers of gas to know in advance the consequences of the purchasing decisions they make." *Id.* at 14a-15a. In its view, although the Commission's May 11, 1988, order provided Transwestern's customers with notice of the possibility that they would be billed directly for gas costs incurred after that date, *id.* at 15a-18a, the customers did not receive meaningful advance notice that they might be billed directly for gas costs incurred prior to that date. *Id.* at 19a-22a.

The court acknowledged that the preamble to the Commission's PGA regulations stated that their purpose was to "assur[e] [pipelines] the recovery of all purchased gas costs." Pet. App. 20a (quoting Order No. 452, *Purchased Gas Cost Adjustment Provision in Natural Gas Pipeline Companies' FPC Gas Tariffs*, 47 F.P.C. 1049, 1051 (1972)). But it concluded that this statement did not furnish pipeline customers sufficient notice to permit them to be billed for balances remaining in a PGA account when it was terminated by a pipeline, because the circumstances that might lead to the complete end of PGA sales are "varied and complex" and "there are other policy values that a customer might think would also bear upon the Commission's resolution of issues concerning unrecovered gas costs under these various scenarios. Pet. App. 20a. The court also acknowledged that two Commission decisions permitting direct billing of Account No. 191 balances when the relevant service was abandoned had indicated that the Commission interpreted the PGA regulations in a manner that was consistent with Transwestern's approach here.[8] But the court found that

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validity of Transwestern's new gas inventory charge were moot. Pet. App. 11a-13a, 22a-24a.

[8] *Western Gas Interstate Co.*, 34 F.E.R.C. ¶ 61,122, reh'g denied in part, 35 F.E.R.C. ¶ 61,012 (1986); *Locust Ridge Gas Co.*, 37 F.E.R.C. ¶ 61,295 (1986).

those decisions likewise did not furnish sufficient notice to Transwestern's customers that they might be billed in a similar manner, because, in its view, the decisions were "quite summary" and "lack[ed] any sort * * * of general rule for the treatment of Account No. 191 balances on complete termination of service." *Id.* at 20a-21a.

Finally, the court rejected the Commission's determination that even if Transwestern's customers had not previously received adequate notice of their responsibility for costs accrued prior to May 11, 1988, and the direct billing therefore constituted a retroactive rate increase, it could permit the increase by waiving the 30-day notice requirement in Section 4(d) of the NGA for "good cause shown." On this issue, the court, without further elaboration, simply followed its prior decision in *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791, 796-797 (D.C. Cir. 1990) (*Columbia Gas II*), petitions for cert. pending, Nos. 89-2001 and 90-131, which held that notice beyond that waivable under Section 4(d) is required before the Commission may approve direct billing of past costs. Pet. App. 21a-22a n.7.

c. On May 31, 1990, the court of appeals denied petitions for rehearing and suggestions for rehearing en banc. Pet. App. 26a-28a.[9] In a separate statement, Chief Judge Wald explained that she had decided that it would be futile to call for a vote on rehearing en banc, in light of the court's denial of a similar suggestion in *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (1989), reh'g denied, 898 F.2d 809 (D.C. Cir. 1990) (*AGD II*), petitions for cert. pending, Nos. 89-1988, 89-1989, 89-1990, 89-2000 and 89-2016. Pet. App. 27a. She continued (*id.* at 28a):

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[9] In denying rehearing, the panel declined to address the Commission's and Transwestern's argument that Transwestern's filing in December 1987 placed its customers on notice that they would be billed for the balance in Account No. 191, because that argument had not been raised in the briefs. Pet. App. 26a.

> I think the Court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry. * * * It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts at allocating the inevitable burdens stemming from fundamental readjustment of the pipeline industry.

REASONS FOR GRANTING THE PETITION

The court of appeals has invalidated an important feature of the policy adopted by the Federal Energy Regulatory Commission to address and properly resolve the take-or-pay problems that have pervaded the natural gas industry for a number of years. As a practical matter, Transwestern will be unable to recover the actual costs of gas that it purchased and sold to its customers, SoCal and Williams, prior to May 11, 1988. The only permissible method of recovering those costs under the court's ruling—through a commodity surcharge on future sales pursuant to the PGA mechanism—has been eliminated, because Transwestern terminated the PGA approach in order to establish a gas inventory charge that would prevent future take-or-pay problems and because SoCal and Williams were permitted to designate no future purchases under Transwestern's new rate schedule. SoCal and Williams therefore will be able to escape costs that were incurred on their behalf, even though the basic premise of the PGA mechanism (as stated in the preamble to the Commission's regulations permitting its use) is to assure a pipeline that it will recover such costs from its customers, and even though that preamble, several Commission decisions, and Transwestern's filing in December 1987 clearly indicated that they were responsible for paying costs accumulated in Account No. 191. The decision below also may deter other pipelines from instituting a gas inventory charge

and terminating the PGA mechanism in furtherance of the Commission's policy of avoiding future take-or-pay problems.

The court of appeals held that the direct billing mechanism constitutes impermissible retroactive ratemaking, in violation of the "filed rate doctrine." In reaching this conclusion, the court applied essentially the same view of the filed rate doctrine and retroactive ratemaking that it had adopted in *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) (*AGD II*),[10] and it expressly relied on its prior ruling in *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) (*Columbia Gas II*), in holding that notice beyond that waivable under Section 4(d) is required before the Commission may approve the direct billing of past costs. We have filed a petition for a writ of certiorari seeking plenary review of the D.C. Circuit's decision in *AGD II*, see *FERC* v. *Associated Gas Distributors*, No. 89-2016 (filed June 22, 1990), and a number of other parties have filed certiorari petitions seeking plenary review in *AGD II* as well.[11] We also have filed a petition for a writ of certiorari in *Columbia Gas II*, suggesting that

[10] Even so, the court conceded that its statements in *AGD II*, 893 F.2d at 356-357, and *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (*Columbia Gas I*), suggesting "that a rate violates the filed rate doctrine simply because a customer cannot respond in some way that enables it to escape the charge" were "clearly inconsistent" with the Commission's powers to establish, and alter prospectively, charges that are avoidable (if at all) only through the sometimes elaborate process of securing an abandonment under Section 7 of the Act, 15 U.S.C. 717f. Pet. App. 19a.

[11] See *Berkshire Gas Co.* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1988 (filed June 20, 1990); *Tennessee Small General Service Customer Group* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1989 (filed June 21, 1990); *Tennessee Gas Pipeline Co.* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1990 (filed June 21, 1990); *Natural Fuel Gas Supply Corp.* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2000 (filed June 22, 1990).

the petition be held and disposed of as appropriate in light of the Court's disposition of the certiorari petitions filed by the Commission and others in *AGD II*. In addition, various pipelines have filed a certiorari petition seeking plenary review of the D.C. Circuit's decision in *Columbia Gas II*. See *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, petition for cert. pending, No. 89-2001 (filed June 22, 1990).

Although the decision below is of substantial practical importance and rests on a fundamentally mistaken view of the filed rate doctrine, we do not urge the Court to grant plenary review. For the reasons given in our certiorari petition (at 18-20) in *Columbia Gas II*, we believe that if (as we urge) the Court grants plenary review in *AGD II*, its decision in that case will shed considerable light on the appropriate disposition of this case (and *Columbia Gas II*).[12] We therefore suggest that the instant petition be held and disposed of as appropriate in light of the Court's disposition of the certiorari petitions filed in *AGD II* and *Columbia Gas II*.

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[12] We explain in our certiorari petition (at 13-18) in *Columbia Gas II* that the D.C. Circuit did not hold that Section 4(d) prohibited rate increases with pre-filing effective dates, but instead fashioned a requirement that the Commission give a distinct, extra-statutory form of notice to customers that they might later be billed an additional amount by the pipeline. For the reasons stated in our petition in *Columbia Gas II*, that was error. That discussion applies equally to the D.C. Circuit's rejection of the Commission's reliance on Section 4(d) in this case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of (1) the petition for a writ of certiorari in *FERC* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2016, and the other certiorari petitions seeking review of the judgment of the District of Columbia Circuit in that case (see note 11, *supra*) and (2) the petition for a writ of certiorari in *FERC* v. *Columbia Gas Transmission Corp.*, petition for cert. pending, No. 90-131 (filed July 18, 1990), and the other certiorari petition seeking review of the judgment of the District of Columbia Circuit in that case, *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, petition for cert. pending, No. 89-2001 (filed June 22, 1990).[13]

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

WILLIAM S. SCHERMAN
General Counsel
Federal Energy Regulatory Commission

AUGUST 1990

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[13] For the same reasons, the certiorari petition filed by Transwestern seeking plenary review of the D.C. Circuit's decision in the instant case, *Transwestern Pipeline Co.* v. *Kansas Power & Light Co.*, 90-344, should also be held and disposed of as appropriate in light of *FERC* v. *Associated Gas Distributors*, No. 89-2016; *FERC* v. *Columbia Gas Transmission Corp.*, No. 90-131, and related cases.

* The Solicitor General is disqualified in this case.

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 4 of the Natural Gas of 1938, 15 U.S.C. 717c, provides in relevant part:

Rates and Charges

(a) **Just and reasonable rates and charges**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) **Undue preferences and unreasonable rates and charges prohibited**

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) **Filing of rates and charges with Commission; public inspection of schedules**

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient

form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) **Changes in rates and charges; notice to Commission**

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * *

2. Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), provides:

Fixing rates and charges; determination of cost of production or transportation

Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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and KANSAS POWER & LIGHT COMPANY,
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**On Petitions for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in this case. Petitioners have consented to INGAA's filing of this brief. The consent of respondent, Kansas Power and Light Company, was requested but refused.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas

transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and, to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

REASONS FOR GRANTING THE MOTION

This case involves orders of the Commission which permitted a natural gas pipeline to direct bill its customers for the balance remaining in a purchased gas cost account (Account No. 191) when the pipeline terminated the account upon implementation of a gas inventory charge pursuant to the Commission's Order No. 500. 52 Fed. Reg. 30,334, III FERC Stats. & Regs. ¶ 30,761 (1987). The United States Court of Appeals for the District of Columbia Circuit held that notwithstanding the Commission's finding of "good cause" for waiving the notice requirement in Section 4(d) of the NGA, the direct billing by the pipeline of such costs constituted retroactive ratemaking in violation of the filed rate doctrine. *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990).

The issue in this case is therefore similar to the issues presented in *FERC* v. *Associated Gas Distributors*, *petition for cert. pending*, No. 89-2016 (filed June 21, 1990), in which the Commission has sought review of another D.C. Circuit opinion which held that a Commission order authorizing a pipeline's recovery of take-or-pay costs using the purchase deficiency methodology prescribed in Order No. 500 violated the filed rate doctrine. *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"). INGAA has filed a motion for leave to file

amicus curiae in support of the Commission's petition for writ of certiorari in that case. Additionally, the issues in this case are similar to those raised by the Commission and certain pipelines in their respective petitions for certiorari in *FERC* v. *Columbia Gas Transmission Corporation, petition for cert. pending*, No. 90-131 (filed July 18, 1990) and *Panhandle Eastern Pipe Line Company* v. *Columbia Gas Transmission Corporation, petition for cert. pending*, No. 89-2001 (filed June 22, 1990). Those petitions seek review of a decision of the D.C. Circuit which held that notwithstanding the Commission's finding that "good cause" existed to waive the notice requirement of NGA Section 4(d), the direct billing by pipelines for certain production costs that the Commission had previously required the pipelines to pay producers for past sales of gas constituted a violation of the filed rate doctrine. *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia II*"). INGAA has also filed a motion for leave to file *amicus curiae* in support of the petitions for writ of certiorari in that case.

The court of appeals in the case herein, as in *AGD II* and *Columbia II*, has unjustifiably extended the filed rate doctrine and failed to accord proper deference to the ratemaking authority vested in the Commission by Section 4 of the NGA. The result of the court of appeals' actions is to prohibit the collection of prudently incurred purchased gas costs, the recovery of which is guaranteed under Title VI of the NGPA. Moreover, the decision below has the practical effect of thwarting efforts of the entire natural gas pipeline industry to make a full transition to competitive markets and thus to put the economic vestiges of past regulatory schemes behind them. The gas inventory charge mechanism adopted by the Commission's Order No. 500 is an integral part of the Commission's policy for addressing future take-or-pay responsibility in the new competitive environment. The Commission's determination that pipelines may direct bill the balance of gas costs in their Account No. 191 upon implementation of a gas in-

ventory charge is a vital step in the industry's transition process. While the magnitude of such costs varies by pipeline, the costs at issue herein are substantial—as much as several hundred million dollars for a single pipeline.

INGAA, as representative of the interstate natural gas pipeline industry which is directly affected by the court of appeals' decision, has a unique perspective and interest which will aid this Court in its consideration of the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, INGAA respectfully requests that the following brief in support of petitioners be accepted for filing.

Respectfully submitted,

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October 9, 1990

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Supreme Court of the United States

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KANSAS POWER AND LIGHT COMPANY, *et al.*,
Respondents.

No. 90-367

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA
and KANSAS POWER & LIGHT COMPANY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate com-

merce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and, to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

SUMMARY OF ARGUMENT

The decision below, *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), is one of three cases in which the United States Court of Appeals for the District of Columbia Circuit has applied a novel and erroneous interpretation of the "filed rate doctrine" that directly contradicts this Court's prior decisions and undermines the Commission's statutory authority to prescribe "just and reasonable" rates for sales and transportation of natural gas in interstate commerce. In *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"), *petitions for cert. filed*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (No. 89-1988), 59 U.S.L.W. 3001 (U.S. June 21, 1990) (Nos. 89-1989, 89-1990), 59 U.S.L.W. 3001 (U.S. June 22, 1990) (No. 89-2000), and 59 U.S.L.W. 3005 (U.S. June 21, 1990) (No. 89-2016), the court of appeals held that an allocation of take-or-pay costs among pipeline customers based on a "purchase deficiency" method violated the filed rate doctrine.[1] Similarly, in *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988) ("*Columbia I*"), and *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia II*"), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131),

[1] The Commission had approved such an allocation methodology because it reasonably reflected customer responsibility for the incurrence of the allocated costs.

the court withheld the deference due the Commission by holding that an order allowing natural gas pipelines to recover through "direct bills" costs which pipelines had been required to pay producers for past sales of gas constituted unlawful retroactive ratemaking and thereby violated the filed rate doctrine. INGAA has filed as *amicus curiae* in support of petitioners in both of those proceedings.

In the instant case, the court of appeals has once again improperly applied the filed rate doctrine, and in doing so has failed to accord the Commission due deference pursuant to the standards established in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Moreover, by expanding this Court's prior construction of the filed rate doctrine, the decision below invalidates a crucial element of the Commission's program to prevent a recurrence of the take-or-pay crisis that has severely hampered the Commission's efforts to promote competition in the interstate natural gas pipeline industry during the past decade. The Commission has concluded that to avoid future take-or-pay problems pipelines should be authorized to establish a gas inventory charge ("GIC") to handle the costs of maintaining a gas inventory responsive to customer needs. By striking down the cost recovery mechanism designed to enable pipelines to make the transition from the old ratemaking method to GICs, the decision seriously jeopardizes the Commission's entire program for dealing with future take-or-pay.

This case presents issues which are critical to the natural gas pipeline industry in making the transition to a more competitively-oriented market. In addition, the court of appeals' improper application of the filed rate doctrine in this case raises issues similar to those addressed by the Commission in its petitions for writ of certiorari in *AGD II* and *Columbia II*. INGAA therefore recommends that certiorari be granted herein.

ARGUMENT

I. THE DECISION BELOW JEOPARDIZES THE COMMISSION'S PROGRAM TO RESTRUCTURE THE GAS INDUSTRY ALONG MORE COMPETITIVE LINES

The central barrier to the Commission's effort during the 1980's to reshape the natural gas industry and promote competition in gas supply markets has been the system of take-or-pay contracts entered into by pipelines and producers during the prior decades. As recognized by the court of appeals in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("*AGD I*"), the Commission could not reasonably adopt one of the key elements of this restructuring—the open-access, non-discriminatory transportation program—without also addressing the issues created by these take-or-pay contracts. The Commission's answer in Order No. 500 was essentially two-pronged. As to the costs of settling *past* take-or-pay disputes or amending uneconomic contracts, the Commission adopted the so-called "equitable sharing" plan at issue in *AGD II*. The Commission addressed future take-or-pay by authorizing pipelines to establish a rate mechanism that would prevent a repetition of the crippling build-up of take-or-pay costs that plagued the industry under the prior system. The mechanism—a "gas inventory charge"—was specifically designed to "help pipelines restructure their service obligations to customers and their purchase obligations to producers so as to reflect the realities of anticipated future operations and prevent future take-or-pay problems." Order No. 500, 52 Fed. Reg. 30,334 at 30,346, III FERC Stats. & Regs. ¶ 30,761 at 30,793 (1987).

In practical effect, GICs, such as the one granted Transwestern Pipeline Company ("Transwestern"), were intended to replace the traditional purchased gas adjustment ("PGA") cost recovery mechanism by compensating

pipelines for standing ready to provide sales services to the extent of customer nominations.[2] To the extent a customer does not take the volumes it nominates, it pays an inventory charge. This is the pipeline's compensation for its gas supply service.

A number of pipeline applications have been filed with the Commission to implement GICs and eliminate the pipelines' PGA clauses. A necessary element of any such GIC is a means to recover the remaining balance of unrecovered gas costs at the time the PGA is terminated and the GIC takes effect. As noted by the Commission in its petition for writ of certiorari herein, the decision below precludes recovery of these remaining balances and may deter pipelines from instituting gas inventory charges. This will thwart the Commission's policy of avoiding future take-or-pay problems and encouraging competition. Petition at 9-10.

The plain fact is that a pipeline is highly unlikely to institute a gas inventory charge if the price of doing so is to preclude recovery of substantial unrecovered purchased gas costs.[3] It is not feasible for a pipeline to institute a new gas pricing mechanism keyed to competitive

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[2] Transwestern's PGA was a cost recovery mechanism similar to one that has been widely used by regulated interstate pipelines with the approval of the Commission. PGAs were instituted in 1972 when pipelines served as the primary merchants of natural gas, and when, for the most part, gas producers sold directly to pipelines, and pipelines subsequently resold the gas. PGA cost recovery mechanisms were designed to enable pipelines to manage their gas acquisition programs without having to file new rate cases in response to frequent variations in gas costs. Thus, any pipeline with a PGA provision in its tariff could defer to Account No. 191 any over- or undercollections of actual purchased gas costs. It is the court of appeals' denial of recovery of these Account No. 191 amounts by direct billing that is at issue here.

[3] The magnitude of such costs varies by pipeline, of course, but INGAA is aware of Account No. 191 balances of nearly $200 million on a single pipeline.

gas markets if it is forced to absorb prudently incurred costs in meeting its certificated sales service obligations. To the extent that pipelines are forced to absorb such costs, it will undercut the pipelines' merchant function, and prevent them from having a meaningful role in the gas sales market. The Commission's determination that pipelines may directly bill costs deferred to Account No. 191 is thus a vital step in the industry's transition process. It authorizes a just and reasonable—and lawful—rate methodology that suits the industry's current circumstances and properly assigns costs to customers who were responsible for their incurrence.

II. THE DECISION BELOW UNJUSTIFIABLY EXPANDS THE FILED RATE DOCTRINE AND PREVENTS PIPELINES FROM RECOVERING THEIR COSTS

When Transwestern filed for authority to bill the costs at issue directly it proposed no change in rates that would implicate the filed rate doctrine. Instead, it merely sought to alter the *mechanism* for recovery of purchased gas costs which were properly included in Account No. 191. Had Transwestern simply continued its purchased gas adjustment provision, such costs would have been collected in the normal course of events. Although the Account No. 191 costs at issue arose from past purchases, the proposed direct bill in no way altered the rates associated with past purchases. The decision below therefore is premised on a fundamental, but erroneous, assumption: that a direct bill to eliminate the remaining Account No. 191 balance transforms otherwise proper charges into retroactive rates. In the court of appeals' view, because the cost recovery mechanism changed—from the PGA surcharge to a direct bill—Transwestern should be denied recovery of purchased gas costs which were incurred on behalf of Transwestern's sales cus-

tomers and for which there has been no claim of imprudent action.[1]

The court of appeals' decision, if affirmed, will deny pipelines the reasonable opportunity to recover prudently incurred costs to which they are statutorily entitled. The result of the decision below, therefore, is directly at odds with this Court's clear guidance in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"). Moreover, the court's decision defies the rule of *Chevron*, *supra*, concerning statutory construction and the deference due an agency interpreting its organic statute. Because the costs at issue were prudently incurred, and because the "end-result" reached by the Commission was the product of a "permissible" interpretation of the authority vested under Section 4 of the NGA, the Commission must be sustained. *See Hope* and *Chevron*, *supra*. Finally, further support for upholding the Commission is found in Section 601(c) of the NGPA, 15 U.S.C. § 3431(c) (1988), which guarantees, absent fraud, abuse, or similar grounds, that pipelines may pass through any amounts paid with respect to any purchase of natural gas. The reality is that the court of appeals' decision would make fair and compensatory cost recovery a practical impossibility given the transformation in natural gas markets over the last decade. *See AGD I*, 824 F.2d at 1025-1026.

INGAA submits that certiorari should be granted in this proceeding for the same reasons set forth in INGAA's brief *amicus curiae* in *AGD II* and *Columbia II*: that is, the D.C. Circuit has incorrectly and unjustifiably expanded the filed rate doctrine as well as the rule against

[1] In authorizing Transwestern's direct billing, the Commission stated that "[t]o require Transwestern to absorb potential under-collections related to gas purchases made before implementation of the GIC would be unreasonable because there is no showing that the costs at issue have been imprudently or abusively incurred." *Transwestern Pipeline Company*, 44 FERC ¶ 61,164 at 61,537 (1988).

retroactive ratemaking and has thereby improperly limited the Commission's ratemaking authority by substituting its judgment for that of the Commission. As noted by the Commission and Transwestern in their respective petitions for certiorari herein, the D.C. Circuit in this case followed essentially the same analytical approach as it did in *AGD II* and the *Columbia* decisions.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

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Nos. 90-344 and 90-367

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRANSWESTERN PIPELINE COMPANY,
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v.

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FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT THE PROCESS GAS CONSUMERS GROUP IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has the power under the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.* (1988), to permit an interstate pipeline to bill its customers retroactively and without advance notice for gas costs from a prior period.

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BRIEF OF RESPONDENT THE PROCESS GAS CONSUMERS GROUP IN OPPOSITION

STATEMENT OF THE CASE

On May 11, 1988, the Federal Energy Regulatory Commission ("FERC") approved Transwestern Pipeline Company's ("Transwestern") application to implement a gas inventory charge ("GIC") which included a proposal to eliminate the pipeline's purchased gas adjustment ("PGA") clause and to direct bill its customers for any

negative balances remaining in its Account 191.[1] Pursuant to that authorization, Transwestern billed certain amounts to Williams Natural Gas Company, an interstate pipeline which was in turn allowed to recover the amounts from Respondent The Kansas Power and Light Company ("KPL")[2] and from Southern California Gas Company, a local distribution company regulated by Respondent Public Utilities Commission of the State of California ("CPUC").[3] These charges are ultimately passed through to retail gas consumers, including members of Respondent The Process Gas Consumers Group.

Under FERC's PGA regulations, interstate pipelines, such as Transwestern, project their future purchased gas costs. The difference between these *projected* costs (which are publicly filed as part of the pipeline's tariff) and the costs actually incurred are booked in the pipeline's Account 191.[4] Ordinarily, Account 191 balances are cleared through credits or surcharges applied to the projected gas costs in succeeding PGA periods. For Transwestern, however, FERC approved a different, non-PGA method of recovery. Because the pipeline had elected to eliminate its PGA (in connection with its voluntary application for a GIC), FERC allowed it to use a direct billing scheme to clear its Account 191 of its unrecovered gas costs. Under this direct billing method, Transwestern assigned cost responsibility to its customers on the basis of their respective sales entitlements.

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[1] *Transwestern Pipeline Co.*, 43 FERC ¶ 61,240, *order on reh'g*, 44 FERC ¶ 61,164 (1988).

[2] KPL is a natural gas local distribution company doing business in the states of Kansas, Missouri, and Oklahoma.

[3] CPUC is a state agency charged with protecting the interests of natural gas consumers throughout California.

[4] A pipeline's effective gas rate at any given time reflects its current estimated cost of gas plus a series of surcharges or credits representing prior period adjustments. *See* 18 C.F.R. § 154.305 (1990).

The court of appeals concluded that the filed rate doctrine bars Transwestern's collection of the unrecovered purchased gas costs in Account 191 which had accrued before May 11, 1988, the date of FERC's order approving the pipeline's direct billing mechanism.[5] Recovery of costs accrued before that date was properly held to be barred because, prior to FERC's order, customers had "no meaningful notice" of the charge. *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 581 (D.C. Cir. 1990). The court of appeals rejected FERC's claim of authority to waive the filed rate doctrine, relying in part on the decision by another panel of the D.C. Circuit in *Columbia Gas Transmission Corp. v. FERC* (*"Columbia"*).[6]

REASONS FOR DENYING THE WRIT

There is no basis for Petitioners' attempt to cast FERC's orders below expansively as a key part of the regulatory and market "sea change" in the natural gas industry in recent years. In fact, the challenged ruling of the court below concerns only a minor aspect of one pipeline's election to terminate its PGA. There is neither any reason to believe that the issue, which the pipeline itself could have avoided, is of major practical importance even to the parties, nor any reason to assume that other pipelines have faced or will face similar issues.

The D.C. Circuit's decision rests on a fact-specific determination as to the adequacy of the notice afforded consumers in the unique circumstances of Transwestern's voluntary termination of its PGA. The case involves no new principle of statutory construction nor any other issue of industry-wide significance.

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[5] The court found "no bar" under the filed rate doctrine to the recovery of costs accrued after May 11, 1988. 897 F.2d at 580 n.7.

[6] 895 F.2d 791 (D.C. Cir. 1990), *petitions for cert. filed sub nom. Panhandle Eastern Pipe Line Co. v. Columbia Gas Transmission Corp.*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (Nos. 89-2001, *et al.*).

The decision of the court of appeals—that FERC may not retroactively impose a different rate from the one on file at the time gas is sold—is wholly consistent with numerous decisions of this Court applying the filed rate doctrine. It properly recognizes that FERC cannot escape its statutory mandate to provide consumers with advance notice of rate changes simply by labelling its actions "policy" initiatives. An agency "does not have the power to adopt a policy that directly conflicts with its governing statute." *Maislin Industries, U.S. v. Primary Steel*, 110 S.Ct. 2759, 2770 (1990) ("*Maislin*").[7]

In sum, the D.C. Circuit's decision does not warrant the exercise of certiorari jurisdiction.

I. THIS CASE INVOLVES A MINOR, ISOLATED MATTER OF NO PRACTICAL SIGNIFICANCE.

As the court of appeals noted, this case was originally selected by the parties to decide a major issue of regulatory policy—the GIC. Importantly, however, "most of the key issues in this case have been rendered moot" and only "peripheral issues survive." 897 F.2d at 573-74.

The "peripheral issue" presented by Petitioners here is whether an as-yet-undetermined amount of Transwestern's deferred gas costs—*i.e.*, those arising before the date (May 11, 1988) that FERC granted Transwestern's request to change the method by which such costs were traditionally recovered—are ineligible for collection under the FERC-approved methodology because of inadequate notice. In fact, the record does not show whether there are any such deferred costs.

Moreover, this case involves unique circumstances that are unlikely to be repeated. Transwestern was not required to terminate its PGA as a condition for instituting a GIC. Thus, despite claims to the contrary by Transwestern (Pet. at 18) and the Acting Solicitor General (Pet. at 9), allowing the decision below to stand will not affect any of the fundamental issues now confronting the natural gas industry. FERC and the pipeline remain free to pursue any lawful means by which the disallowed costs may be recovered in future rates.

II. THE COURT OF APPEALS' FACTUAL DETERMINATION THAT NOTICE WAS INADEQUATE IS CONSISTENT WITH THE CONSUMER PROTECTION OBJECTIVES OF THE NATURAL GAS ACT.

It is significant that Petitioners have not disputed the D.C. Circuit's finding that the rates approved here were, in part, retroactive. Instead, their arguments focus on the court's ruling that customers had not been provided sufficient notice of the rate change to justify an earlier effective date.[8] As these arguments acknowledge, the basis for the decision below was the court's analysis of FERC's position that the statutory notice requirement had been satisfied by the Commission's 1972 general PGA regulations and by two 1986 decisions that did not even involve Transwestern.[9] Thus, notwithstanding Pe-

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[7] Although *Maislin* arose under the Interstate Commerce Act, rather than the Natural Gas Act, its holding is equally applicable here. FERC, like the ICC, has no authority "to alter the well-established statutory filed rate requirements." 110 S.Ct. at 2770.

[8] As the court of appeals correctly recognized, under FERC's PGA regulations, a pipeline customer normally is not responsible for deferred gas costs once it leaves the pipeline's system; it pays only the filed rates in effect at the time it is being served. 897 F.2d at 580, citing *Kentucky West Virginia Gas Co.*, 37 FERC ¶ 61,310 at 61,912 (1986).

Traditionally, overrecoveries or underrecoveries attributable to gas purchased by *former* customers are treated no differently than other deferred costs. By industry practice and the operation of the PGA regulations, all such deferred costs are included as a surcharge on future rates and recovered through customers' prospective purchases only. *See* 18 C.F.R. § 154.305(d).

[9] Those decisions were *Western Interstate Gas Co.*, 34 FERC ¶ 61,122, *reh'g denied in part*, 35 FERC ¶ 61,012 (1986) and *Locust Ridge Gas Co.*, 37 FERC ¶ 61,295 (1986). The court of appeals did not address arguments, made for the first time in petitions for

titioners' grand characterizations, this case does not pose important legal questions concerning the scope of the filed rate doctrine. Rather, it presents a perfectly ordinary, non-recurring, fact-specific question of whether adequate notice was given as required by the filed rate doctrine and by the explicit provisions of Section 4(d) of the Act. That, we submit, is not a question calling for this Court's attention.

As this Court has long recognized, FERC has no power to change rates retroactively; rather, it is "limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order." *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). "[T]he Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) ("*Arkla*"). *See also FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962). The decision below is consistent with, and mandated by, this Court's decisions interpreting the Act and applying the filed rate doctrine.

The filed rate doctrine is embodied in Sections 4(c) and (d) of the Act. The requirement for advance notice of rate changes is explicit in Section 4(d): "notice shall be given"; there must be "public" posting; the proposed change must be stated "plainly." 15 U.S.C. § 717c(d). These requirements reflect the fundamental purpose of the filed rate doctrine, which is "to render rates definite and certain." *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932), quoted in *Maislin*, 110 S.Ct. at 1766. That purpose is essential to the consumer protection objectives of the Act.

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rehearing, that notice was provided by Transwestern's December 1987 filing proposing the charge. *See* Transwestern App. at 26a.

As this Court has stated, the Act was designed to "protect the consumer interests against exploitation at the hands of private natural gas companies," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944), affording "a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Comm'n of New York*, 360 U.S. 378, 388 (1959). Certiorari is not required to confirm the wholly conventional premise underlying the D.C. Circuit's decision here—*i.e.*, that the filed rate doctrine bars FERC from imposing rate changes without proper notice to consumers.

Transwestern (Pet. at 17-22) attempts to frame this case as one in which the agency's interpretation of its governing statute is entitled to special deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*"). Such efforts, though understandable, are misplaced. Not even the Acting Solicitor General has invoked *Chevron* here, because this case involves not statutory interpretation, but rather the correctness *vel non* of FERC's determination that sufficient notice had, in fact, been given.[10] As Transwestern's own extensive argument makes clear, the court of appeals focused precisely on the *adequacy* of notice, based on its examination of the agency record below. The pipeline's ironic complaint that the D.C. Circuit's analysis is "irrelevant and tedious" (Transwestern Pet. at 27) does not change the factual nature of this inquiry. In any event, *Chevron* does not require deference to agency orders that hinge on erroneous factual conclusions or that contravene the purpose and intent of the statute itself.

[10] Citing *Chevron*, the court of appeals itself acknowledged that, had FERC explicitly approved a rate and stated when that rate would take effect, the court could not have intruded in FERC's province. 897 F.2d at 578. But the court concluded that such deference was not warranted where FERC clearly failed to satisfy the Act's notice requirements.

Transwestern's emphasis on the alleged just and reasonable "end result" of FERC's orders (Pet. at 17, citing *Hope, supra*) provides no basis for arguing that the court of appeals should not have addressed whether the rates in question complied with the filed rate doctrine.[11] In fact, the D.C. Circuit acted well within its power to determine whether the agency abused its authority, notwithstanding claims that the end result, however achieved, was reasonable. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968) (the responsibility of the reviewing court is to ensure that the Commission has not "abused or exceeded its authority").

Finally, Transwestern's complaint (Pet. at 26-27) that the D.C. Circuit's decision conflicts with the Natural Gas Policy Act ("NGPA") and FERC's PGA regulations is misplaced. Nothing in the NGPA or the PGA regulations either (1) creates an "entitlement" (Pet. at 26) to the recovery of gas costs in contravention of the Natural Gas Act's notice requirements or (2) protects Transwestern from the consequences of its own decisions. Transwestern *voluntarily* applied for and accepted a GIC certificate, giving its customers the right not to purchase any more gas under the PGA. That customers did what the pipeline invited them to do fails to establish Transwestern's "entitlement" to cost recovery. Moreover, the court of appeals found only that certain costs could not be collected under the mechanism before it; the decision in no way prevents Transwestern from proposing a lawful procedure for recovering any deferred costs it may have incurred before the May 11, 1988 date of FERC's order. And, as previously noted, the record does not show whether there are any such costs.

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[11] In *Maislin*, this Court rejected similar efforts to override the filed rate doctrine. The Court there was unpersuaded by the ICC's labelling the carrier's conduct an "unreasonable practice," since the agency's action was "flatly inconsistent with the statutory scheme as a whole." 110 S.Ct. at 2768.

III. THE COURT OF APPEALS' OPINION IS NOT IN CONFLICT WITH RULINGS BY OTHER FEDERAL COURTS OF APPEALS.

Transwestern argues that the decision below is in conflict with rulings of the U.S. Courts of Appeals for the Fifth and Tenth Circuits in *Texas Eastern Transmision Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) and *Phillips Petroleum Co. v. FERC*, 902 F.2d 795 (10th Cir. 1990), respectively. Those decisions uphold FERC orders authorizing the collection of certain production-related costs under NGPA Section 110. 15 U.S.C. § 3320 (1988). In fact, however, there is no conflict among the circuits on the issue at bar.

In *Texas Eastern*, the court found that "purchasers *were on notice* as of 1980" (through FERC's Order 94 rulemaking) of the date when production-related costs would be assessed, even though they were not on notice as to the precise amount of the charge. 769 F.2d at 1066, 1060 n.8 (emphasis added). Here, by contrast, the court of appeals—considering an entirely different series of FERC orders and regulations—found "no meaningful notice in any Commission act before May 11, 1988." 897 F.2d at 581. Even more importantly, in *Texas Eastern*, the Fifth Circuit specifically rejected arguments that rate increases should be allowed as of an earlier date, citing "the purchasers' need for notice." 769 F.2d at 1066. Instead of creating a conflict with the D.C. Circuit, the Fifth Circuit's ruling in *Texas Eastern* lends additional support to the decision challenged here.

Since the Tenth Circuit in *Phillips* never discussed the filed rate doctrine, it is difficult to ascertain any pertinent conflict with the D.C. Circuit's decision. That case was limited to the issue of "whether the Commission followed the *Texas Eastern* mandate." 902 F.2d at 799. The Tenth Circuit's decision had nothing to do with the PGA regulations or agency orders construed here. The

only instance in which the court of appeals there addressed the matter of notice involved FERC's 1987 decision to require producers to have had contractual authority in 1983 to be eligible to collect interest for certain fuel and power allowances. Again, unlike the situation here, the court there found that producers had indeed been "on notice" in 1983 that interest on production-related costs would be allowed only if contractually authorized. 902 F.2d at 804.

The lack of any conflict among the circuits is further shown by the fact that the Acting Solicitor General does not support Transwestern's claim of such conflict.

IV. THIS COURT SHOULD NOT HOLD THIS CASE SUBJECT TO ITS RULING IN *AGD* AND *COLUMBIA*.

The Acting Solicitor General has requested that this case be held for disposition in light of the petitions for certiorari filed in *Associated Gas Distributors v. FERC* ("*AGD*")[12] and *Columbia*. This request should be denied because the issues in those cases are entirely different.

Unlike this case, which hinges on a straightforward factual determination of whether or not consumers were given adequate notice of a rate increase, *AGD* addresses the issue of whether the rate methodology approved by FERC constituted a retroactive rate increase. Here the petitions argue that customers had notice that they were responsible for paying the costs at issue; in contrast, no petitioner in *AGD* claims that customers knew they would be assessed additional charges for gas which they had purchased years earlier. Thus, there is nothing in the grounds asserted for review of *AGD* to suggest that any foreseeable disposition of that case would affect the holding of the court of appeals in this case.

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[12] 893 F.2d 349 (D.C. Cir. 1989) *petitions for cert. filed sub nom. Berkshire Gas Co. v. Associated Gas Distributors*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (Nos. 89-1988, *et al.*).

There is even less reason for holding this case pending disposition of *Columbia*. The Acting Solicitor General did not seek plenary review of *Columbia*, requesting instead that it be held for disposition in light of *AGD* (Pet. in No. 90-131 at 18). The Brief for Certain Respondents in Opposition (at pp. 22-23) pointed out the lack of merit in that request for a hold.

There is even less basis for a hold in this case. *Columbia* involves FERC's claim that its statutory authority to waive the Act's 30-day prior notice requirement allows it to impose higher rates for gas purchased by customers many years earlier. Importantly, certiorari was *not* sought with respect to the D.C. Circuit's earlier decision rejecting FERC's claim that adequate notice of this rate increase had been provided through the Order 94 rulemaking process.[13] Thus, the adequacy-of-notice issues which are at the heart of the instant case are not present in *Columbia*. Finally, although FERC did claim in both cases that it could waive the 30-day prior notice provision in the Act, the circumstances assertedly justifying waiver in the two cases are entirely different. As the court of appeals noted, FERC's waiver claim here was "a last stand," and it was questionable whether that claim had any "remaining life" since it applied only to the costs, if any, incurred before the May 11, 1988 date of FERC's order. 897 F.2d at 580 n.7.

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[13] *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *reh'g denied*, 844 F.2d 879 (1988).

CONCLUSION

For the reasons stated, the petitions for Writ of Certiorari should be denied.

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Nos. 90-344 and 90-367

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

TRANSWESTERN PIPELINE COMPANY,
Petitioner,
v.
KANSAS POWER AND LIGHT COMPANY, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF TRANSWESTERN PIPELINE COMPANY

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October 19, 1990

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RULE 29.1 STATEMENT

The listing of Petitioner Transwestern Pipeline Company's parent company and its subsidiaries was provided on pages iii-ix of the petition for a writ of certiorari in No. 90-344. The following companies should be added to the list of subsidiaries of Enron Corp.:

Enron Gas Liquids Holding B.V. (The Netherlands)

Enron Gas Liquids B.V. (The Netherlands)
Loga Chemicals B.V. (The Netherlands)

Enron Argentina, S.A. (Argentina)
Enron Milford, Inc. (Delaware)
Enron Power Operations Limited (England)
Enron Power Construction Limited (England)
Teeside Power Limited (United Kingdom)
Enron Storage Company (Delaware)
Enron Gas Processing (U.K.) Limited (United Kingdom)

The following entities should be added to the list of joint ventures of Enron Corp.:

Bannon International Limited (Liberia)

Owned by Enron Gas Liquids, Inc.—50%
Subsidiaries:

Mundogas Shipping Ltd. (Liberia)

Mundogas America Limited (Liberia)
Mundogas Europe Limited (Liberia)
Mundogas Orinoco Limited (Liberia)
Mundogas Pacific Limited (Liberia)
Mundogas Transportation Limited (England)

Enron Arbross Ship Management Co. Ltd. (Hong Kong)

Owned by Enron Gas Liquids, Inc.—50%

Halton International Limited (Liberia)

Owned by Enron Gas Liquids, Inc.—50%
Subsidiaries:

Mundogas (Storage) Inc. (Liberia)
Mundogas (UK) Ltd. (England)
Mundogas Limited (Liberia)
Mundogas Services Limited (Liberia)
Mundogas Trading Limited (Liberia)

Tarumi Enterprises Ltd. (Liberia)

Owned by Enron Gas Liquids, Inc.—50%
Subsidiaries:

Veldmoor International Limited (Liberia)
Weddell Corporation (Liberia)

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REPLY BRIEF OF
TRANSWESTERN PIPELINE COMPANY

INTRODUCTION

Transwestern Pipeline Company ("Transwestern") hereby replies to the briefs in opposition filed by the Process Gas Consumers Group ("PGC") and the Kansas Power and Light Company ("KP&L") jointly with the Public Utilities Commission of the State of California ("CPUC") on October 9, 1990.

SUMMARY OF ARGUMENT

Respondents' briefs in opposition confirm that the questions presented by the petitions for a writ of certiorari are worthy of review. Respondents fail to reconcile the standards of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (*"Chevron"*) with the lower court's substitution of its own narrow and inflexible "notice" interpretation for the Federal Energy Regulatory Commission's ("FERC") interpretation of what constitutes acceptable "notice" under Section 4(d) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c(d), and with the limits placed by the lower court on the scope of FERC's waiver authority under the same statutory provision. Transwestern submits that *Chevron* requires deference to FERC's attempt to interpret the statute it has been empowered to administer by Congress. The lower court's decision does not grant such deference to FERC.

Respondents have likewise failed to reconcile the conflict inherent between the lower court's decision and the Congressional mandate reflected in Title VI of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3431, *et seq.*, regarding a pipeline's right, under certain circumstances, to recovery of gas costs. Given their resulting inability to defend this conflict as lawfully permissible, respondents assert that Transwestern is seeking a recovery right beyond the express terms of the NGPA. Such is not the case. All Transwestern seeks is the right expressly pro-

vided by the NGPA and NGA—the right to seek recovery from its sales customers of purchased gas costs.

Respondents suggest that the Court's recent decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), ("*Maislin*") supports the lower court's decision. As this Court is well aware, however, *Maislin* did not involve either review of a lower court decision which imposed a notice date different from that imposed by the agency, or review of an agency interpretation of the scope of its waiver authority.

Finally, PGC urges that this Court deny the petitions because "this case involves a minor, isolated matter of no practical significance." PGC Brief at 4. As indicated in the "Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae on Behalf of the Interstate Natural Gas Association of America in Support of Petitioners", filed October 9, 1990, nothing could be further from the truth. For five years now FERC has grappled with the consequences of its efforts to increase competition within the natural gas industry. FERC's orders reviewed below are an outgrowth of the major policy initiatives FERC enunciated in its Order Nos. 436, 451 and 500, and represent FERC's initial efforts under its Order No. 500 gas inventory charge policies to provide "open-access" transportation without a build-up of future take-or-pay. Such issues are not trivial—either in the magnitude of dollars at stake for the natural gas industry or in the direction the industry will take in responding to the combination of future market and regulatory forces.

ARGUMENT

A. The Lower Court Erred In Substituting Its Statutory Interpretation For That Of The FERC

The court below disallowed Transwestern's collection of purchased gas costs based upon the court's interpretation of the "filed rate" doctrine. According to the lower court, the "notice" afforded to Transwestern's customers through FERC regulations and Transwestern's tariff

(and found by FERC to satisfy the NGA Section 4(d) requirement for purposes of assessing cost responsibility for deferred gas costs) was inadequate under the "filed rate" doctrine. The rejection of FERC's notice findings, in favor of the court's own determination of what constituted adequate NGA Section 4(d) notice, was endorsed by both briefs in opposition as consistent with the principles of *Chevron*.

Arguments concerning this asserted notice defect and, ergo, the alleged failure of FERC to properly interpret the "filed rate" doctrine, quickly unravel when considered in the context of the regulatory and statutory system in place for recovery of purchased gas costs and the teachings of *Chevron*. As to the regulatory scheme, Transwestern's tariff—like that of most other interstate pipelines—permitted refunds to (or collection from) jurisdictional sales customers of past period overrecovered (or underrecovered) purchased gas costs by way of incremental credits (or surcharges) on projected jurisdictional sales. This crediting/surcharge mechanism (which is an integral component of the purchased gas adjustment ("PGA") clause implemented in 1972) was designed to keep both a pipeline and its sales customers whole with respect to the gas cost component of a pipeline's rates, and was necessary because of the errors inherent in the method by which this cost component is derived—*i.e.* based upon estimates of the levels and costs of expected purchases and estimates of projected sales.

Moreover, the method by which Transwestern is to recover the purchased gas costs in question arose (and was approved) not as a result of an NGA Section 4 tariff filing, but rather in the context of (1) the termination of Transwestern's jurisdictional sales services on behalf of its two principal customers, (2) the concomitant initiation of firm transportation-only services for one of those customers,[1] and (3) the termination of Transwestern's

[1] The other sales customer elected to leave Transwestern's system entirely.

PGA tariff clause. *See Transwestern Pipeline Co.*, 43 F.E.R.C. ¶ 61,240, *reh'g granted in part and clarified*, 44 F.E.R.C. ¶ 61,164 (1988), App. 55a-127a. Accordingly, in the orders reviewed by the lower court, FERC quite correctly found that its PGA regulations in this regard, and Transwestern's tariff provisions implemented pursuant to these regulations, provided adequate notice to Transwestern's two principal sales customers that they would remain responsible for all purchased gas costs previously incurred by Transwestern and which remained unrecovered upon termination of the underlying sales services and the PGA clause itself. 44 F.E.R.C. at 61,537, App. 113a.

The arguments of PGC and KP&L/CPUC notwithstanding, the adequacy of notice analysis does indeed invoke the *Chevron* standards for review of agency action. Whether framed in terms of adequacy, timing, or otherwise, the findings of FERC rested upon its interpretation of the statutory NGA Section 4 "notice" requirement, and its construction of this statutory requirement, as it established the right of a regulated entity to charge rates and to recover costs associated with the complete termination of jurisdictional sales services.[2] That the lower court substituted its judgement of what constitutes adequate statutory notice is without question.[3] Nevertheless, in the absence of a specific finding that FERC's interpretation

[2] Respondents KP&L and CPUC mistakenly assert that "[w]ithout direct billing, [Transwestern] would have sought to recover these costs prospectively as part of its sales commodity rate to its customers." KP&L/CPUC Brief at 2 (emphasis omitted). This assertion defies logic since the underlying sales services terminated—which is why FERC authorized direct billing in the first instance.

[3] Equally without question is the inconsistency between the lower court's findings on adequacy of notice to Transwestern's customers and its prior findings in *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979), that the collection of fuel costs "left over" in the wake of transition from one cost recovery formula to another does not violate the "filed rate" doctrine.

of the notice requirement did violence to the statutory scheme, a finding which Transwestern submits is lacking in the lower court's decision, "the principle of deference to administrative interpretations '[must be] followed by this Court whenever decision as to the meaning or reach of a statute [requires] reconciling conflicting policies . . . .'" *Chevron*, 467 U.S. at 844 (citations omitted). Such deference was not accorded FERC by the lower court in the decision below.

B. FERC Does Possess The Statutory Authority To Waive The "Filed Rate" Doctrine

The *Chevron* deference standards also apply to FERC's construction of its waiver authority and, specifically, its authority to waive, *in toto*, the notice requirement "for good cause shown." Again, respondents ignore the unambiguous words of the NGA and baldly assert that FERC's waiver authority—and the breadth of the "good cause" exception—applies only to notice to FERC, *i.e.*, the ministerial filing requirement itself. *See e.g.* KP&L/CPUC Brief at 13-16. As such, respondents assert that, although a rate change in advance of notice to (by the act of filing with) FERC may be permissible, "notice" to the customers is mandatory and nonwaivable.[4] Yet, the statute is clear on its face—what is waivable for "good cause" is the "thirty days' notice to the Commission *and to the public*." 15 U.S.C. § 717c(d) (Emphasis added). And, while good cause for waiver of the *FERC* notice/filing requirement has been found where there has been agreement between the contracting parties, *see City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979), nothing in the statute or case law supports the anomalous proposition that, *ipso facto*, there can

[4] Respondents allege that the decision below comports with the Court's holding in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). *See* PGC Brief at 6 and KP&L/CPUC Brief, *passim*. In fact, however, on the very waiver argument presented here, the Court left open the issue of whether the "good cause" exception could permit retroactive collection of an unfiled rate. 453 U.S. at 578, n.8.

never be waiver of the notice-to-the-customer requirement, for good cause shown.

C. The *Maislin* Decision Did Not Eliminate FERC's Statutory Waiver Authority Under The NGA

Maislin does not, as respondents suggest, eliminate FERC's statutory waiver authority under NGA Section 4(d). *See* KP&L/CPUC Brief at 13-16. In fact, the Court explicitly declined to "express [any] view today on the validity of [the Interstate Commerce Commission's interpretation of its waiver authority under the Interstate Commerce Act]." *Maislin*, 110 S. Ct. at 2770 n. 14. Rather, *Maislin* merely provides that rates privately negotiated between parties cannot be implemented unless filed with the ICC. In contrast, in the agency orders under review below, FERC permitted Transwestern—as a condition to other NGA authorizations—to make subsequent NGA Section 4 filings to recover (or refund, as appropriate) any amounts remaining in Account No. 191 upon the termination of the underlying sales services.[5] And, in this context, FERC concluded that ample notice of deferred purchased gas cost responsibility was provided through the PGA regulations as well as the surcharge recovery provisions of Transwestern's tariff, and that good cause existed for a waiver of the notice requirements to the extent such waiver was necessary. *See Transwestern*, 44 F.E.R.C. at 61,537, App. 113a. Accordingly, *Maislin* provides no support for respondents' assertions regarding "filed rate" impediments to the direct bill procedure.

D. The Lower Court's Decision Conflicts With The Requirements Of The NGPA

Respondents concede the applicability of the NGPA but attempt to refute—by overstating—Transwestern's argument concerning the "guaranteed passthrough" pro-

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[5] These filings were, of course, noticed and subsequently accepted, subject to refund, in accordance with the requirements of Section 4 of the NGA. *See Transwestern Pipeline Co.*, 49 F.E.R.C. ¶ 61,436 (1989) and 50 F.E.R.C. ¶ 61,427 (1990).

visions of Title VI of the NGPA (specifically Section 601, 15 U.S.C. § 3431).[6] *See e.g.* KP&L/CPUC Brief at 16-18. By expounding on the proposition that gas cost recovery is not subject to absolute, unqualified guarantees—which no one disagrees with—respondents have resorted to classic "straw-man" tactics which, stated politely, miss the mark.

Transwestern has never claimed an unfettered, non-reviewable right to recovery of gas costs. Indeed, FERC's orders under review below only permitted Transwestern to make subsequent NGA Section 4 filings to collect these gas costs. The filings themselves were accepted by FERC, but suspended, to provide parties the right to challenge cost recovery under the applicable standards of the NGA and NGPA—a point respondents ignore.

What respondents also refuse to acknowledge is that the lower court's "filed rate" findings may result in denying Transwestern the right to recover certain gas costs. Under the court's rationale, nothing Transwestern can do today can cure the alleged "notice" deficiency. Thus, the lower court's decision contravenes both the constitutional and NGA/NGPA protections designed to ensure that regulated gas companies are provided a meaningful opportunity to be recompensed in the provision of reliable and continuing services. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 791-93 (1968); *see also Associated Gas Distributors v. FERC*, 810 F.2d 226, 233 (D.C. Cir. 1987).

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[6] NGPA Section 601 provides in pertinent part, that

> the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if, under subsection (b) of this section, such amount is deemed to be just and reasonable for purposes of sections 4 and 5 of such Act, except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

15 U.S.C. § 3431(c)(2).

E. The Lower Court's Decision Conflicts With Decisions Of Other Circuits

The inflexible and unnecessarily circumspect "filed rate"/notice analysis applied by the lower court cannot be squared with decisions from other circuits which have considered and rejected similar "filed rate" doctrine attacks on FERC orders. *See Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied sub nom. Associated Gas Distributors v. FERC*, 476 U.S. 1114 (1986) and *Phillips Petroleum Co. v. FERC*, 902 F.2d 795 (10th Cir. 1990).[7]

An even more overt conflict exists with respect to the breadth of the Commission's waiver authority under Section 4(d) of the NGA. In this regard, the lower court did not follow its own precedent—and precedents from other circuits—to the extent that its narrow waiver analysis refused to recognize the agreement between Transwestern and its customers, as memorialized in Transwestern's service agreements with its customers (which incorporated all provisions of Transwestern's FERC-approved tariff), permitting recovery of all purchased gas costs (including recovery of unrecovered gas costs through the surcharge provisions). Transwestern's former sales customers agreed to the provisions of Transwestern's PGA mechanism. As such, the PGA clause represents nothing more or less than an agreement which, subject only to the NGPA Title VI requirements, commits Transwestern's customers to reimburse the pipeline for gas costs prudently incurred on their behalf.[8]

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[7] In this regard, the lower court's "filed rate" doctrine analysis conflicts with precedent from the D.C. Circuit. *See Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979).

[8] Indeed, the lower court implicitly referenced this agreement, and the obligations imposed thereunder, when it rejected the downstream purchasers' broad attack on the direct bill mechanism (and, specifically, the prospect of Southern California Gas Company being assessed either the whole, or only a part of the Account No. 191 balance) by stating:

The lower court's failure, to permit waiver (to the extent required) of the "filed rate" doctrine based upon prior agreement of the parties stands in conflict with case law from the D.C. Circuit and from decisions of the Fifth and First Circuits, as well. *See City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979); *see also Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983); *Towns of Concord and Wellesley v. FERC*, 844 F.2d 891, 896-97 (1st Cir. 1988).

F. The Court's Decision In *AGD II* Is Not Dispositive Here

Both briefs in opposition agree that "material differences" between the instant facts and the facts raised by FERC in its certiorari petition, filed June 21, 1990, in *FERC v. Associated Gas Distributors*, Case No. 89-2016 seeking review of the D.C. Circuit's decision in *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *cert. denied*, 59 U.S.L.W. 3277 (U.S. Oct. 9, 1990) (No. 89-2016) ("*AGD II*"), require that Transwestern's certiorari petition be considered on its own merits and independently from the decision in *AGD II*.[9]

The instant case stands in stark contrast to the facts and issues presented in *AGD II* in at least two critical respects. First, there exists no genuine element of retroactivity in the billing procedure under review here. That is, the "past purchase deficiency" methodology—*i.e.* the centerpiece of the *AGD II* appeals—was not at issue in

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> [i]n any event, the first of the options (SoCal bearing the whole charge if it continued to take sales service) was no more than what would have happened under the existing PGA regulations, before the new Transwestern filing, under the same circumstances.

Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 579 (D.C. Cir. 1990), App. 18a.

[9] As stated by PGC, "there is nothing in the grounds asserted for review of [*AGD II*] to suggest that any foreseeable disposition of that case would affect the holding of the court of appeals in this case." PGC Brief at 10.

this case.[10] Second, the costs at issue in the two proceedings are wholly dissimilar. Unlike *AGD II*, the instant appeal deals strictly with Transwestern's right to collect gas costs which, as the lower court acknowledged, would have otherwise been recoverable but for the termination of Transwestern's jurisdictional sales services and related PGA tariff provisions, and the implementation, in lieu thereof, of the direct bill procedure for the recovery of all remaining purchased gas costs. *See Transwestern*, 897 F.2d at 579, App. 18a.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition for certiorari in No. 90-344.

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Date: October 19, 1990

[10] Indeed, nowhere in the opinion below did the court find that the direct bill mechanism (which allocated costs on the basis of contract demand levels) violated the retroactive ratemaking prohibition. And, although the "filed rate" and "retroactive ratemaking" concepts do involve similar considerations—and very often overlap—there are distinctions, apparently recognized by the court below and more directly acknowledged in Judge Williams' concurring opinion denying rehearing and rehearing *en banc* in *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990). Indeed, while the true-up mechanism inherent in PGA surcharges may operate to effect a collection of past costs, so long as the right to recover such costs (*i.e.* surcharges) is on file with FERC, then no unlawful collection can be found.

Nos. 90-344, 90-367

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FEDERAL ENERGY REGULATORY COMMISSION,

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PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, THE KANSAS POWER AND LIGHT COMPANY AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Whether the court of appeals erred in determining that the filed rate doctrine under the Natural Gas Act did not allow the Federal Energy Regulatory Commission to authorize Transwestern Pipeline Company to retroactively increase its rates for gas already-sold to its customers.

PARTIES TO THE PROCEEDING

In addition to Respondents, The Kansas Power and Light Company and the Public Utilities Commission of the State of California, the parties to the proceeding before the court of appeals were:

Citizens Energy Corporation
El Paso Natural Gas Company
Federal Energy Regulatory Commission
Natural Gas Clearinghouse Inc.
Pacific Gas and Electric Company
Process Gas Consumers Group
PSI, Inc.
Southern California Gas Company
Southwest Gas Corporation
Texas Eastern Transmission Corporation
Transwestern Pipeline Company
Williams Natural Gas Company

RESPONDENT'S RULE 29.1 STATEMENT

The Kansas Power and Light Company is a publicly traded corporation. It has no parent company and no subsidiaries which are not wholly owned.

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Nos. 90-344, 90-367

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, THE KANSAS POWER AND LIGHT COMPANY AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

STATEMENT OF THE CASE

The Respondent, The Kansas Power and Light Company (KPL), is a natural gas local distribution company doing business in the states of Kansas, Missouri, and Oklahoma. It is a customer of the Williams Natural Gas Company (WNG) which ceased being a customer of Petitioner, Transwestern Pipeline Company (Transwestern) on February 1, 1988. The Respondent, Public Utilities Commission of the State of California (CPUC), is a state agency which regulates Southern California Gas Company (SoCal), which had previously been a sales customer of Transwestern. The CPUC represents the interests of natural gas consumers throughout California in administrative and judicial proceedings. Under the rulings of the Federal Energy Regulatory Commission, reviewed below by the United States Court of Appeals for the District of Columbia, Transwestern was authorized to direct bill certain costs to WNG, which in turn was allowed to recover them from KPL, and to SoCal, which would seek to recover them from southern California consumers, who are represented herein by the CPUC.

Petitioners challenge a decision of the court of appeals finding that a procedure proposed by Transwestern and approved by the Federal Energy Regulatory Commission (FERC or Commission) for "direct billing" of certain deferred gas costs to its customers violated the filed rate doctrine under the Natural Gas Act (NGA). Without direct billing, the pipeline would have sought to recover these costs *prospectively* as part of its sales commodity rate to its customers. Under the method approved by the Commission, however, the pipeline was authorized to assign responsibility and bill its customers for

the costs *retroactively* based on each customer's pro rata share of total contract demand on the system at an earlier time.

Transwestern proposed direct billing as part of its voluntary application for authority to implement a gas inventory charge (GIC) pursuant to guidelines established by the FERC in its Order No. 500.[1] Transwestern indicated that if the GIC was made effective, the pipeline would terminate its purchased gas adjustment clause (PGA). The PGA is the mechanism used by most pipelines to recover their cost of purchased gas. It is comprised of two components – a rate meant to reflect the cost of current gas purchases and a surcharge intended to recoup the difference between costs incurred and costs recovered.

The difference between cost recovery and cost incurrence is accrued to Account 191 – Unrecovered Purchased Gas Costs. Under currently effective regulations, a surcharge is determined annually by dividing the amount in Account 191 by the pipeline's estimate of sales for the next twelve months. 18 C.F.R. §154.305(c)(3). Over time,

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[1] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, FERC Stats. & Regs. ¶ 30,761, *modified*, Order No. 500-A, FERC Stats. & Regs. ¶ 30,770, *reh'g granted in part*, Order No. 500-B, FERC Stats. & Regs. ¶ 30,772, *modified*, Order No. 500-C, FERC Stats. & Regs. ¶ 30,786 (1987), *modified*, Order No. 500-D, FERC Stats. & Regs. ¶ 30,800, *reh'g denied*, Order No. 500-E, 43 FERC ¶ 61,234, *modified*, Order No. 500-F, FERC Stats. & Regs. ¶ 30,841 (1988), *reh'g denied*, Order No. 500-G, 46 FERC ¶ 61,148 (1989), *remanded sub nom. American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *order on remand*, Order No. 500-H, FERC Stats. & Regs. ¶ 30,867 (1989), *reh'g denied in part*, Order No. 500-I, FERC Stats. & Regs. ¶ 30,880 (1990), *remanded sub nom. American Gas Ass'n v. FERC*, No. 87-1588, *et al.*, (D.C. Cir. Aug. 20, 1990).

assuming that the pipeline is able to keep its gas marketable, the surcharge will allow the pipeline to match its revenue to its gas costs. Since, if its proposal was accepted, Transwestern would no longer have a PGA surcharge in effect, the pipeline proposed to clear its Account No. 191 by direct billing the amounts in it to its sales customers.

ARGUMENT

Review by this Court is not warranted. The ruling of the court of appeals is correct. It is consistent with basic principles of statutory construction and interpretations of the NGA and the "filed rate doctrine" by this Court. The court of appeals acted properly in barring the attempt by the pipeline and the Commission to impose retroactive charges upon consumers of natural gas. The decision below is also consistent with established principles of ratemaking for regulated utilities and with the consumer protection purposes of the NGA.

This case presents no substantial question for review by this Court. In fact, the court of appeals' ruling below is entirely consistent with the decision of this Court on the filed rate doctrine in its most recent term in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990). The decision of the court of appeals is also consistent with both its prior rulings and those of other courts of appeals on the same matter.

The petition for writ of certiorari should be denied.

I. THIS COURT SHOULD NOT HOLD THIS CASE SUBJECT TO ITS RULING IN THE *AGD II* APPEAL.

The Commission requests that if the Court grants its certiorari petition in *Associated Gas Distributors v. FERC* (*AGD II*), 893 F.2d 349 (D.C. Cir. 1989),[2] that it hold this case for disposition as appropriate in light of the ruling in that appeal. The Commission states that a decision in that case would "shed considerable light on the appropriate disposition of this case . . . . " Petition for Writ of Certiorari of the Federal Energy Regulatory Commission (FERC Pet.), at 11. In *AGD II*, the court of appeals rejected the use of an allocation formula for direct billing as the basis for recovery by pipelines of a portion of their current costs incurred in settling take-or-pay disputes. Even if review by this Court were appropriate in *AGD II*, the procedure urged by the Commission should not be followed in this case.

The approach proposed by the Commission would only be appropriate if it were clear that a ruling by this Court in *AGD II* would be directly applicable to this matter. In fact, the Commission's statements in its *AGD II* certiorari petition (*AGD II* Pet.) indicate that is not the situation. The Commission views its actions which are the subject of review in *AGD II* quite differently from those at issue here. In its *AGD II* petition, the Commission argued that the allocation method it had approved did not impose a rate increase for gas already sold. *AGD II* Pet., at 21-22. The Commission argued that it had

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[2] The Commission's certiorari petition was docketed in this Court as *Federal Energy Regulatory Commission v. Associated Gas Distributors, et al.*, No. 89-2016.

> instead ordered customers to pay a new rate on a prospective basis to cover a portion of the costs of [the pipeline]'s settlement of its take-or-pay exposure, and it allocated those current costs among [the pipeline]'s customers on the basis of the relative amounts of gas they did *not* purchase during the deficiency period.

Ibid. at 22. (Underscore added; italics original.) By contrast, there is no question that the present case relates to *retroactive* recovery of *past* costs and that the costs in question relate to the "gas that [Transwestern] purchased and *sold* to its customers, SoCal and Williams, prior to May 11, 1988." FERC Pet., at 9. (Emphasis added.)

In view of the above, a mere comparison of the FERC's two positions before this Court (i.e., *compare AGD II* Pet. at 21-22 *with* FERC Pet. at 9) shows that the two cases are totally different and that the present case is not certworthy.

II. THE COURT OF APPEALS FOLLOWED AND APPLIED ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

A. The Statutory Framework and the Filed Rate Doctrine.

Section 4(a) of the NGA provides that:

> [a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

15 U.S.C. §717c(a). In order to assure that rates charged by companies within the Commission's NGA jurisdiction are "just and reasonable," the Act requires that pipeline rates be filed with the Commission and kept available for public inspection, 15 U.S.C. §717c(c), and prohibits the granting of "undue preference or advantage" to any customer or any "unreasonable difference" in rates "as between localities or as between classes of service." *Ibid.*

Proposed rate changes must, of course, be filed with the Commission and rates may not be changed except with Commission approval upon thirty days' notice to the Commission and the public. 15 U.S.C. §717c(d). For "good cause shown," the Commission may

> allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

Ibid.

Consistent with these statutory provisions, this Court has developed and applied the "filed rate doctrine" which "prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission . . . . " *Arkansas Louisiana Gas Co. v. Hall* (*Arkla*), 453 U.S. 571, 573 (1981). According to the Court, "the right to a reasonable rate is the right to a rate which the Commission files or fixes." *Montana-Dakota Utilities Company v. Northwestern Public Service Company*, 341 U.S. 246, 251-52 (1951). As a result, both the Commission and the courts lack authority to

change rates retroactively. The rule thus "bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.' " *Arkla*, 453 U.S. at 578, *quoting City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979). Summarizing the rule, this Court has stated that:

> the Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and *prevents the Commission itself from imposing a rate increase for gas already sold*.

Arkla, 453 U.S. at 578. (Emphasis added.)

The filed rate doctrine had its origins in this Court's cases interpreting the Interstate Commerce Act, *see, e.g.*, *Lowden v. Simonds-Shield-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Pennsylvania R. Co. v. International Coal Co.*, 230 U.S. 184, 196-97 (1913), "and has been extended across the spectrum of regulated utilities." *Arkla*, 453 U.S. at 577. Its long-standing application by this and other courts has made it an integral part of the NGA.

Just last term this Court revisited and reaffirmed its traditional view of the filed rate doctrine in *Maislin*. In its ruling reversing the Interstate Commerce Commission (ICC), the Court adhered strictly to the principles discussed above. The *Maislin* case dealt with the ICC's application of its Negotiated Rates policy. In its order enunciating that policy, the ICC discussed a growing trend in the motor carrier industry for carriers and shippers to negotiate rates lower than those on file with the ICC. The ICC ruled that the shippers would not be required to pay the tariffed rate concluding that, under such circumstances, "it could be fundamentally unfair not

to consider a shipper's equitable defenses to a claim for undercharges." *NITL – Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (Negotiated Rates I)*, 3 I.C.C.2d 99, 103 (1986).

The ICC's ruling was based on its conclusion that the passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry, justified departure from strict adherence to the filed rate requirement. The ICC ruled that the new competitive atmosphere in the industry was sufficient to deter discrimination. 3 I.C.C.2d at 106. The ICC clarified its new policy in *NITL – Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates* (*Negotiated Rates II*), 5 I.C.C.2d 623 (1989). The Commission explained that its policy did not recognize "equitable defenses" but rather applied the "affirmative statutory requiremen[t] and obligatio[n]" of the Interstate Commerce Act that a carrier's practices be reasonable. 5 I.C.C.2d at 631 n. 18. The Commission stated that it was finding it to be an unreasonable practice for carriers to negotiate rates with customers, not publish the rates and later demand payment at the tariffed rates after service had been rendered. 5 I.C.C.2d at 628 n. 11.

On appeal, the Court followed its traditional view of the filed rate doctrine and ruled that the ICC's abandonment of strict adherence to it was unlawful. The Court relied in part on the "classic statement" of the doctrine as explained in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915). As the Court there stated:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any

> pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable.

Ibid. at 97.

The court of appeals properly applied these principles in the case below. SoCal and WNG were on notice of only the rates on file with the Commission when they took service and paid for service under those rates. Under the direct billing mechanism, however, the pipeline obtained authority to impose a retroactive rate alteration upon its customers

> over and above the rates on file at the time of the sale, for the gas they had already purchased. However described, this constitutes a retroactive rate increase . . . prohibited by the NGA.

Columbia Gas Transmission Corp. v. FERC (*Columbia I*), 831 F.2d 1135, 1140 (D.C. Cir. 1987); *see also Arkla*, 453 U.S. at 578 n. 8.[3] Consistent with the rigid application of the filed rate doctrine embraced by the *Maislin* Court, the court of appeals properly ruled that the Commission had no authority to retroactively raise Transwestern's rates to SoCal and WNG. *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990).

B. The Court of Appeals Properly Employed the Applicable Principles of Statutory Construction.

Transwestern correctly indicates that the standard for review in this case is that established by *Chevron, U.S.A.*,

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[3] See discussion of the direct billing mechanism *supra*, at pages 2-4.

Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). However, contrary to Transwestern's assertions, the court of appeals' review of the Commission's actions was consistent with the applicable standards of statutory construction.

1. The Filed Rate Doctrine.

The argument made by Transwestern in this case is remarkably similar to that made by the ICC and rejected by the Court in *Maislin*. In that case, the ICC argued that its decision to abandon the filed rate doctrine was justified by changes in the industry which it regulated and that the ICC was, under the *Chevron* rule, entitled to deference since the Act did not "specifically address the types of practices that are to be considered unreasonable and because its construction is rational and consistent with the statute." *Maislin*, 110 S. Ct. at 2768. The Court rejected this argument. Since Congress had not diverged from the strict interpretation of the filed rate doctrine traditionally followed by the Court, it refused to revisit its prior interpretations of the rule. *Ibid.*[4]

Since the filed rate doctrine under the NGA is rooted in the Interstate Commerce Act, *Arkla*, 453 U.S. at 577, the Court's logic in *Maislin* is equally applicable here. The

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[4] The Court cited its decision in *California v. FERC*, 109 S. Ct. 2024, 2029 (1990), in which it recognized the respect the "Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes."

Court's long-standing interpretation of the filed rate doctrine is so deeply ingrained in the NGA that the Commission's contrary interpretation is simply not permissible since it is inconsistent with the regulatory scheme as Congress enacted it and understood it to function.

Transwestern also argues that the court of appeals failed to give proper deference to the Commission's finding that the pipeline's customers had sufficient notice to overcome the requirements of §4(d) of the NGA and the filed rate doctrine. As the court of appeals found with regard to notice, however, the only notice that Transwestern's customers had prior to the Commission's May 11, 1988 order was that they might be liable for recovery of deferred gas costs through the operation of the Account 191 surcharge if they continued to purchase gas from the pipeline. *Transwestern Pipeline Co. v. FERC*, 897 F.2d at 579-81.

Concerning the filed rate doctrine issue, Transwestern echoes the argument made by the ICC in *Maislin*. On that issue, the pipeline argues that the court of appeals departed from acceptable norms of judicial proceedings by failing to accept "FERC's reasonable and equitable solution to the residual cost responsibility issues left in the wake of the 'open-access' transition." Petition for Writ of Certiorari of Transwestern Pipeline Company (Transwestern Pet.), at 22. To the contrary, application of the *Chevron* test in this case leads to the same conclusion as that reached in *Maislin* – that the Commission's interpretation of the act is impermissible since it would result in the very occurrences which the act was meant to avoid: 1) the application of a rate not on file when the sale occurred; and 2) the imposition of a rate increase for gas already sold. *See Arkla*, 453 U.S. at 578.

2. Waiver of the Filed Rate Doctrine.

Transwestern alleges that the court of appeals' decision "effectively reads out of Section 4(d) of the NGA the express authority vested in FERC to waive the notice requirement." Transwestern Pet., at 22. In fact, by holding that the notice requirement may not be waived, the court below acted consistently with long-standing precedents and kept the Commission from reading *into* the statute an exception to the filed rate doctrine wholly inconsistent with the regulatory scheme.

The jurisprudence concerning the commission's power to waive the filed rate doctrine is quite limited. No court has ever found a general power in the Commission to waive the application of the rule. The courts of appeals have dealt with the issue on several occasions. However, the courts have found waivers to be allowed only in cases in which the parties had agreed to the rates to be effective *before* they were filed with the Commission. *See, e.g., City of Piqua, supra* at 954; *City of Girard v. FERC*, 790 F.2d 919, 922-23 (D.C. Cir. 1986) (in which the court rejected a waiver request due to the lack of an agreement); and *Hall v. FERC*, 691 F.2d 1184, 1192 (5th Cir. 1982).[5] In light of

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[5] It is also clear that the statute allows the Commission to shorten the notice of a rate change to less than the statutorily provided 30 days. 15 U.S.C. §717c(d). For example, for good cause shown, the Commission may allow a rate change to be effective on notice as short as one day. However, the Commission's argument that it may retroactively waive such notice would allow its limited power under this section to swallow the filed rate doctrine.

the Commission's duty to protect consumers from exploitation at the hands of the natural gas companies, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1941); *Maryland People's Counsel v. FERC*, 761 F.2d 780, 781 (D.C. Cir. 1985), it would be strange indeed if the Commission could waive the rights of the very customers it is obligated to protect to benefit the companies it is empowered to regulate.

These rulings in these cases are, of course, totally consistent with this Court's ruling in *Arkla*. In that case, the Court recognized that the right to a reasonable rate is the right to pay only rates set by the Commission to have prospective effect. *Arkla*, 453 U.S. at 577, 578.[6] Only by requiring rates to be filed with and approved by the Commission before they are assessed can the mandate of *Arkla* and its progeny be fulfilled. As shown by *Maislin*, strict compliance with the filed rate doctrine continues to be required by this Court.[7]

Finally, the decision of the court of appeals is consistent with the statute. NGA §4 includes recitations that rates must be "just and reasonable," 15 U.S.C. §717c(a), filed with the Commission and available for public

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[6] Admittedly, the Court did suggest that the Commission may "permit a waiver." *Arkla*, 453 U.S. at 577. However, that language was clearly dictum and, in any event, there is no discussion in *Arkla* of the circumstances under which a waiver might be appropriate.

[7] In *Maislin*, the Court reiterated the *Maxwell* Court's statement that the filed rate doctrine is "undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress." 110 S. Ct. at 2766, *quoting Maxwell*, 237 U.S. at 97.

inspection, 15 U.S.C. §717c(c), and non-discriminatory. 15 U.S.C. §717c(b). The Commission is responsible for ensuring that these provisions of the NGA are followed. Clearly, the drafters of the NGA intended, consistent with practice under the Interstate Commerce Act with which they were familiar when the NGA was adopted, that only rates filed with the Commission may be charged by the companies it regulates.[8]

The interpretation of the filed rate doctrine followed by the court of appeals is consistent with the statute and this Court's view of it. As the Court recognized in *Maislin,* while the Commission

> has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, it does not have the power to adopt a policy that directly conflicts with its governing statute. . . . Generalized congressional exhortations to "increase competition" cannot provide the [Commission] authority to alter the well-established statutory filed rate requirements.

110 S. Ct. at 2770. (Citation omitted.)

Moreover, since the Court's interpretation is of long standing, Congress "must be presumed to have been fully

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[8] The Commission contended and Transwestern now argues that the authority under §4(d) of the Act to waive the 30 day notice provision translates into a power to waive the filed rate doctrine altogether. Given the context of the waiver language, the interpretations of the filed rate doctrine by this and other courts over many years, and the explicit requirement throughout the NGA that rates be on file and open to public inspection, this argument is baseless.

cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over a half a century . . . . " *Square D Co. v. Niagara Frontier Traffic Bureau, Inc.*, 476 U.S. 409, 420 (1986). Since the court of appeals has merely followed the traditional view of the filed rate doctrine which this Court recently reaffirmed in *Maislin*, there is no basis for the granting of a writ.

III. THE COURT OF APPEALS' RULING DOES NOT CONFLICT WITH THE NGPA OR PGA REGULATIONS.

As a further ground for obtaining review by this Court, Transwestern asserts that the court of appeals denied the pipeline its

> statutory entitlement to recovery of gas costs – whether as undercollections recorded in Account No. 191 or otherwise – if it demonstrates that such costs are (i) costs paid for the purchases of natural gas and, (ii) do not exceed the NGPA Title I price ceilings and (iii) are not excessive due to fraud, abuse, imprudence or other grounds.

Transwestern Pet., at 26.

Transwestern's argument is based on misconceptions of both the effect of the ruling of the court of appeals and the meaning of Section 601 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §3431. First, the decision below did not bar Transwestern from recovering its deferred gas costs but merely rejected the method selected by the pipeline and approved by FERC. It was up to Transwestern and not the court of appeals to design a legal mechanism for recovery of its deferred gas costs. For

instance, Transwestern could have taken the course adopted by Texas Eastern Transmission Corporation when it proposed its GIC. Texas Eastern kept its PGA in operation thereby eliminating the need to find an alternate method for recovery of its deferred gas costs. *Texas Eastern Transmission Corp.*, 44 FERC ¶61,413, at 62,325 (1988).

Second, while NGPA §601 precludes the Commission or a court from disallowing gas costs which meet the conditions listed by Transwestern, it does not *guarantee* that the costs will be *recovered*. Even if the gas prices paid by the pipeline are legal – and included in the pipeline's rates – whether there will be full recovery of those costs has always been directly affected by the marketability of the pipeline's gas. It was Transwestern's decision to abandon PGA pricing for its gas, based at least in part on its determination of the market risk inherent in PGA versus GIC pricing. Transwestern could have retained its PGA and cleared its Account No. 191 balance by absorbing the amount necessary to arrive at a competitive rate. *See Tennessee Pipeline Company*, 33 FERC ¶61,014 (1985); 33 FERC ¶61,061 (1985). Additionally, Transwestern was not required to apply for or accept a GIC certificate.

Transwestern's allegation that it has a guarantee of gas cost recovery is also at odds with both FERC and court precedent. The Commission has consistently taken the view that a pipeline is entitled not to a *guarantee* that it will recover its costs through commodity charges, but merely a reasonable *opportunity* to do so. *See, e.g., Transwestern Pipeline Co.*, 40 FERC ¶61,324, at 61,994 (1987). The Commission's past rulings on this issue are consistent with decisions by this Court. As it has stated:

> It was noted in the *Hope Natural Gas* case that regulation does not assure that the regulated business [will] make a profit. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1941); *see FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). All that was held was that a company could not complain if the return which was allowed made it possible for the company to operate successfully. . . . The due process clause has been applied to prevent governmental destruction of existing economic values. *It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.*

Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 566-67 (1945). (Emphasis added.)

Under the NGPA, pipelines remain at risk for the recovery of their gas costs and, if full inclusion of those costs in rates would make their gas unmarketable, they may be precluded from recovery as a result of market forces. Indeed, Transwestern asserted in its petition that one reason for the growth in the pipelines' Account 191 balances was that their customers ceased taking pipeline gas and purchased less expensive gas at the wellhead. Transwestern Pet., at 6-7. However, just as "[t]here is no evidence that Congress [in enacting the NGPA] had any intent to create . . . a producer-assistance program," *FERC v. Martin Exploration Management Company*, 486 U.S. 204, 210 (1988), there is no evidence that it envisioned the NGPA as a "pipeline-assistance program." Thus, the possibility that Transwestern may not recover all of its gas costs as a result of the court of appeals decision does not establish grounds for review by this Court.

IV. THE COURT OF APPEALS' OPINION IS NOT IN CONFLICT WITH RULINGS BY OTHER FEDERAL COURTS OF APPEALS.

Transwestern argues that the decision below is in conflict with rulings of the U.S. Circuit Courts of Appeals for the Fifth Circuit and Tenth Circuit in *Texas Eastern Transmission Corp. v. FERC (Texas Eastern)*, 769 F.2d 1053 (5th Cir. 1985), and *Phillips Petroleum Co. v. FERC (Phillips)*, 902 F.2d 795 (10th Cir. 1990), respectively. In fact, there is no conflict between the court's rulings and the cited cases.

Both *Texas Eastern* and *Phillips* dealt with regulations issued by the Commission outlining the circumstances under which first sellers[9] of natural gas can recover certain "production-related" costs under NGPA §110(a)(2), 15 U.S.C. §3320(a)(2).[10] The issues raised by this appeal – the scope and meaning of the filed rate doctrine and the authority of the FERC to waive the application of that rule – were not advanced by the parties in those cases or addressed by either court.

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[9] "First sales" of natural gas under the NGPA include all sales to any interstate pipeline, intrastate pipeline, or natural gas local distribution company. 15 U.S.C. §3301(21)(A). First sales do not include sales by those entities unless the gas was produced by the interstate pipeline, intrastate pipeline, local distribution company, or an affiliate thereof. 15 U.S.C. §3301(21)(B).

[10] NGPA §110(a)(2) provides that a price paid above the applicable maximum lawful price (MLP) will not be considered to exceed the MLP if the price exceeds the MLP to the extent necessary to recover qualified production-related costs. 15 U.S.C. §3320(a)(2).

The court's ruling in *Texas Eastern* was based on the language of the NGPA. The pipeline and distributor parties argued that production-related cost allowances should only have been allowed from the date of the Commission's order in 1983 establishing their levels and not retroactively from the Commission's 1980 order in which it had announced its intention to establish such allowances. 769 F.2d at 1066. This argument was based on the explicit statutory requirement that producers could recover (over and above the applicable MLP) only those production-related costs "allowed" by the Commission. *Ibid.* The pipelines and distributors argued that prior to the 1983 order, which set the level of recovery, there was no Commission authorization for recovery of those costs and therefore recovery of such costs prior to that order was unlawful. *Ibid.* To this the court responded that the Commission's order allowing retroactivity was a "fair balancing of the various problems involved." *Ibid.* It therefore allowed retroactive recovery as of the date of the Commission's 1980 order, which provided notice to parties. The effect of the filed rate doctrine on retroactivity was never raised.

The *Texas Eastern* court did touch tangentially on the notice issue presented here and ruled in a manner totally consistent with the court of appeals in this case. The producers had argued that the Commission should be required to allow recovery of production-related costs retroactive to the enactment of the NGPA even though the Commission had never given notice that it might take such an action. Rejecting this request, the court stated that "rules of this type should be made retrospective, absent adequate notice only in rare cases" and that this

was not a case in which retroactivity without notice was appropriate. *Ibid.*[11]

Phillips did not address these issues either. The sole "retroactivity" issue addressed in that case was whether the Commission failed to follow the mandate of the court of appeals in *Texas Eastern* by requiring explicit contractual authorization for retroactive recovery of interest on production-related costs. *Phillips*, 902 F.2d at 803-05. The court ruled only that the Commission had acted "reasonably and within its discretion in requiring contract authority for the collection of interest on retroactive fuel and power allowances . . . . " *Ibid.* at 804. Again, there was no discussion of the filed rate doctrine or the Commission's authority to waive it.

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[11] The Commission's own rulings prior to Transwestern's December 1, 1987 filing are consistent with the court of appeals' view of the notice requirement. In *Kentucky West Virginia Gas Co.*, 37 FERC ¶61,310 (1986), the Commission rejected a proposal by a pipeline to direct bill deferred gas costs to its customers. The Commission rejected arguments by the pipeline that, by virtue of its PGA, its customers had advance notice that they would be subject to collection of the pipeline's unrecovered purchased gas costs. The Commission stated that the "general notice of a repricing right" did not provide sufficient notice to the pipeline's customers to allow retroactive billing to them of deferred gas costs. 37 FERC at 61,912-13.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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